

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ANTHONY JACKSON,

Defendant and Appellant.

E065218

(Super.Ct.No. FSB1502137)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Jennifer A. Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Joseph Anthony Jackson and codefendant Lawrence Kennedy¹ were charged with the murder of Richard Ramirez (Pen. Code, § 187;² count 1). Defendant was charged as an aider and abettor. A jury found defendant but not Kennedy guilty of murder. In a bifurcated trial, the jury also found true an allegation that defendant had a prior strike conviction for robbery (§§ 211, 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced defendant to an indeterminate term of 50 years to life.

After defendant filed a notice of appeal, this court appointed counsel to represent defendant. Defense counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and facts, and identifying four potentially arguable issues. Those issues include: (1) Whether there is a record sufficient to facilitate meaningful appellate review; (2) whether defendant was prejudiced by improper impeachment of prosecution witnesses; (3) denial of defendant's request for a new attorney under *Marsden*;³ and (4) ineffective assistance

¹ Kennedy is not a party to this appeal.

² Unless otherwise noted, all statutory references are to the Penal Code.

³ *People v. Marsden* (1970) 2 Cal.3d 118.

of counsel (IAC) based on defendant's trial counsel failing to object to the admissibility of cell phone tower evidence based on the *Kelly-Frye*⁴ standard.

Defendant requests this court to conduct an independent review of the record. We offered defendant an opportunity to file a personal supplemental brief but he has not done so. Under *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues. We therefore affirm the judgment.

II

STATEMENT OF FACTS

On April 7, 2015, Monique Clemente asked defendant to drive her to and from a nearby medical marijuana dispensary. Clemente and defendant lived in the same apartment complex, Villa Real apartments, in San Bernardino. Defendant agreed to give Clemente a ride in exchange for \$5, to pay for gas. Defendant drove Clemente and her sister, Desiree Emmanuel, to the dispensary. He waited in the car while the two women made their purchase. When the two women returned to defendant's car, they attempted to pay defendant \$5, as agreed. Defendant told the women he wanted \$10. The two women did not have \$10. They got out of defendant's car and started walking home. When they got home, Clemente told her boyfriend, Richard Ramirez, what had happened.

The next day, Clemente and Emmanuel went to defendant's apartment to discuss what had happened the day before. Clemente and defendant argued. Ramirez went over to defendant's apartment and told defendant he was being disrespectful. Defendant told

⁴ *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.

Ramirez the two women owed him \$5 and that Ramirez should come back at lunch time. Clemente, Emmanuel, and Ramirez returned to Clemente's apartment. Clemente's cousin, Richard Smith, was also at the apartment that day.

Later, that evening, defendant knocked on Clemente's front door. Defendant told Ramirez he was going to "handle" him but not outside because there were cameras. Right after defendant left, there was a knock on the door. There was no response when Clemente asked who was there. Clemente opened the door. A man wearing a hooded sweatshirt asked to speak to Ramirez. Ramirez unlocked the screen door and invited the man inside. The man entered the apartment, fatally shot Ramirez in the back, and ran away.

Genessey Sanchez, who also lived at Villa Real apartments, testified she heard a noise that sounded like a firecracker and saw a man wearing a hooded sweatshirt pass her at the front apartment gate, as he left the apartment complex. The man was about 5 feet, 4 inches tall. Sanchez briefly spoke with the man while at the gate. Sanchez later identified the man as Kennedy.

Detective Mario Granado reviewed video surveillance footage taken from surveillance cameras at the apartment complex on the night of the shooting. The video showed defendant and an individual in a hooded sweatshirt walking in and out of the apartment complex and carport several times between 9:18 and 9:39 p.m. At around 9:39 p.m. defendant walked in the front gate, followed by the individual in a hooded sweatshirt. Moments later, the individual in the hooded sweatshirt fled from the

apartment complex. Defendant then walked from the apartment complex to the street. Officers arrived at the scene at 9:47 p.m.

The day after the shooting, Granado interviewed defendant. Defendant told Granado Ramirez was a friend. Defendant stated that he gave Clemente and Emmanuel a ride to the marijuana dispensary. The women did not have enough money to pay him for gas, so he told them to walk home. Ramirez later told defendant he needed to apologize to Clemente and Emmanuel. Ramirez briefly argued with defendant. Later that night, defendant told Ramirez he planned to apologize and bring Clemente groceries.

Granado showed defendant surveillance footage of defendant walking through the front gate, followed by a person in a hooded sweatshirt. Defendant said he did not recall anyone walking next to him and did not know who the individual in the sweatshirt was. He admitted leaving and returning to the complex a few times that evening, including going to the market, returning to his apartment to get his wallet he had forgotten, and retrieving his keys he had left in his car. Defendant denied having anything to do with the shooting.

On April 11, 2015, at around 10:00 p.m., security officer Michael Wong spotted Kennedy at Little Zion Manor apartments. When Wong attempted to contact Kennedy, Kennedy ran away, tripped, fell to the ground, and dropped a metal object. Wong heard gunshots fired in his direction and then recovered a Kimber 1911 .45-caliber handgun. Wong released the gun to Police Sergeant Hernandez. A criminalist determined that an expended shell casing, found outside the doorway to Clemente's apartment, was fired from the Kimber handgun.

Detective King testified defendant's phone records showed that defendant's phone received calls from a phone registered to Kennedy at 1564 North Pennsylvania, in San Bernardino, where Kennedy lived. Kevin Boles, a cell phone analyst for the Federal Bureau of Investigation (FBI), testified to calls made from defendant and Kennedy's cell phones during the evening of April 8, 2015.

Crime scene investigator William Flesher testified that the day after the shooting, Sanchez told Flesher she would have a hard time identifying the person wearing the hooded sweatshirt. Kennedy's younger brother and defendant's nephew, Lorenzo Merez, testified he was at home with Kennedy for most of the day on April 8, 2015. Merez left their residence (their mother's home) for about an hour, from 9:30 p.m. to 10:30 p.m. Kennedy was there when Merez left and when he returned.

Kennedy testified he was 6 feet 2 inches tall. He said he met defendant in April 2015 and did not spend time with defendant or talk to him on the phone. He denied ever going to Villa Real apartments. Kennedy testified he was at his mother's residence from about 4:00 p.m. and thereafter, for the rest of the day and evening. On April 11, 2015, he visited a friend at Little Zion Manor apartments. While there, waiting for a friend, Kennedy heard a noise coming from the rear of the complex. Since he had previously witnessed a shooting at the complex, Kennedy ran. He saw a black figure approach from the rear of the complex. The person was a security guard, who kicked him in the back, causing him to fall to the ground. Kennedy denied carrying a gun at that time. Kennedy denied he was the person wearing the hooded sweatshirt in the surveillance footage.

III

SUFFICIENCY OF RECORD ON APPEAL

The record on appeal does not include a reporter's transcript of jury voir dire but this does not raise an arguable issue on appeal. The clerk's transcript reflects that jury voir dire began and concluded on October 14, 2014. The reporter's transcript states that "jury selection commenced; not included herein for appeal purposes." The record on appeal is therefore silent as to whether either party exercised challenges for cause or peremptory causes during voir dire. If any challenges were made, the record on appeal is also silent as to how the trial court ruled on them. Defendant's appellate attorney states that she asked "trial counsel" to inquire as to whether any challenges were exercised during voir dire. "Trial counsel could not recall whether any challenges were exercised. Thus, appellant counsel had no facts upon which to file a motion to augment the record to include voir dire proceedings."

Jury voir dire is not a part of the normal record on appeal. (Cal. Rules of Court, rule 8.320(c)(3); *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1092.) To obtain a reporter's transcript of voir dire, appellant must file an application with the trial court for the additional record (Cal. Rules of Court, rule 8.324(b)(2); *Goodwin*, at p. 1092), or file a motion in the Court of Appeal to augment the appellate record (*People v. Gaston* (1978) 20 Cal.3d 476, 482). Most criminal appeals do not raise jury voir dire issues, and in only a small percentage of cases is a transcript of jury voir dire prepared. (*Goodwin*, at p. 1092.)

The record on appeal indicates that defendant did not file an application for a voir dire transcript and there is no showing justifying requiring the transcript. There is also no showing that an adequate substitute for the record cannot be obtained or that defendant was prejudiced in any way, such that there was an unfair trial or any miscarriage of justice.

IV

IMPEACHMENT TESTIMONY BY PROSECUTION WITNESSES

Defendant posits there may be an arguable issue as to whether defendant was prejudiced by the improper impeachment of prosecution witnesses, Clemente, Smith, and Emmanuel. Defendant asserts that these witnesses' testimony, that they did not recall providing certain information to Detective Granado, was not inconsistent with their out-of-court statements made to Granado. (Evid. Code, §§ 770, 1235; *People v. Green* (1971) 3 Cal.3d 981, 988.) Defendant did not raise this evidentiary objection in the trial court. Therefore defendant forfeited it on appeal under the general rule that any claim regarding the admissibility of evidence will not be reviewed on appeal unless there was a specific objection on the ground raised on appeal. (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.)

Even assuming Clemente, Smith, and Emmanuel's testimony was not admissible under the impeachment evidence hearsay exception, allowing it was harmless error and not prejudicial. It is not reasonably probable the jury would have reached a different result, had the testimony been excluded. (*People v. Herring, supra*, 20 Cal.App.4th at p. 1074, citing *People v. Haskett* (1982) 30 Cal.3d 841, 866.)

V

MARSDEN HEARING REQUEST

There are no arguable issues relating to the trial court's denial of defendant's request for new counsel during a *Marsden* hearing on October 8, 2015. During the trial readiness hearing on October 8, 2015, defendant requested new defense counsel. Defendant told the court he filed a *Marsden* motion because his attorney never talked to him. Defendant complained that his attorney was not adequately representing him. Defendant had asked his attorney to subpoena witnesses and have people come talk with defendant at his attorney's office. In response, the trial court conducted a confidential *Marsden* hearing.

During the *Marsden* hearing, the court determined that defendant's attorney was highly experienced and that the attorney-client relationship had not broken down to such an extent defendant could not receive a fair trial. The court therefore denied defendant's *Marsden* request for a new attorney.

The record does not show any *Marsden* violation or any basis for arguing prejudicial error based on the trial court denying defendant's request for a new attorney.

VI

IAC CHALLENGE TO CELL PHONE TOWER EVIDENCE

FBI cell phone analyst, Kevin Boles, testified he analyzed phone numbers registered to defendant and Kennedy. He examined calls made from their phone numbers to determine which cell towers received signals from defendant and Kennedy's phones on April 8, 2015. Boles determined that a call placed from Kennedy's phone at around 6:00

p.m. contacted a cell tower near Kennedy's residence. Calls placed from Kennedy's phone at between 9:43 p.m. and 9:57 p.m. contacted a cell tower about a mile from defendant's residence.

Boles further testified several calls placed from defendant's phone between 6:20 p.m. and 8:59 p.m. contacted a cell phone tower located near Kennedy's residence. Calls placed from defendant's phone between 9:43 p.m. and 9:58 p.m. contacted the cell phone tower near defendant's residence. Boles testified he could not determine whether a cell phone signal was diverted to another cell phone tower, that was not the closest tower in the event of a cell tower overload caused by a high volume of calls. He also could not determine the specific location of the phone or who was using the phone when the calls were placed.

The *Kelly-Frye* rule governs the admissibility of expert testimony regarding new scientific methodology. (*People v. Leahy* (1994) 8 Cal.4th 587, 591.) Defendant's trial attorney did not object at trial to Bole's expert testimony and the failure to do so does not constitute IAC. The *Kelly-Frye* rule applies only to new scientific techniques or methodologies, not to new devices that carry out these methodologies. (*People v. Nolan* (2002) 95 Cal.App.4th 1210, 1215; see *Leahy*, at p. 605.) The scientific technology of transmitting radio signals between two locations (cell phone and tower) is not a new technology. Boles's expert witness testimony about the way the system was designed and how the information was gathered was appropriate.

To secure the reversal of a conviction based on IAC, a defendant must show (1) his counsel's performance was deficient when measured against the standard of a

reasonably competent attorney, and (2) counsel's deficient performance so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Here, counsel's conduct in not objecting to Boles's expert testimony fell within the wide range of reasonable professional assistance. We must give great deference to counsel's tactical decision not to object to the evidence, and conclude an objection to the evidence likely would not have been sustained. (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) The record on appeal therefore does not support an IAC challenge to Boles's expert testimony.

VII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

SLOUGH

J.